



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Southwest Region
777 Sonoma Ave., Room 325
Santa Rosa, CA 95404-6528

August 2, 2005

In Response Refer To:
151416SWR2005SR00354:SKL

Ms. Katharine Mworka
State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, California 95812-2000

Dear Ms. Mworka:

By this letter, NOAA's National Marine Fisheries Service (NMFS) registers its objection to the Notice of Petition application number 5638, filed by U.S. Bureau of Reclamation (BOR) for an amendment of the description of place of use. Permit number 11887 authorizes a 5,000 cfs diversion from the San Joaquin River in Fresno and Madera counties using Friant Dam with a Season of Diversion between November 1 to October 31, and a storage of 1,210,000 acre feet (AF) for the purposes of municipal, domestic, irrigation, and recreational within the boundaries of the Friant Project as shown on Reclamation Map #214-212-37 that is on file with the State Water Board.

BOR is petitioning the State Water Resources Control Board (SWRCB) for a change of Place of Use for: 1) Sky Harbour, Hidden Lakes Estates, Brighton Crest and Millerton New Town, and 2) Table Mountain via Permit 5638.

Diversion occurs from the San Joaquin River that historically supported Spring-run Chinook salmon and steelhead. These species were extirpated as a consequence of the construction and operation of Friant Dam and other irrigation activities.

NMFS has several reasons to be interested in this petition.

First, BOR has been delivering water to these subdivisions without SWRCB authorization. The water delivered must be considered in addition to that already claimed



in both the diversion rate and the annual storage volume. These unauthorized commitments potentially reduce water supplies that are needed for authorized purposes. The current operations from Friant Dam have contributed to the drying of 60 river miles of the San Joaquin River. This action only makes conditions worse.

Second, BOR has been found to be in violation of California State law (CDFG §5937) by not keeping fish in good condition downstream of Friant Dam (Natural Resources Defense Council [NRDC] v. Patterson, August 27, 2004). It is likely as a consequence of this decision that flows will be returned to the San Joaquin River. Lack of flow is a major factor in the extirpation of both Spring-run Chinook salmon and steelhead, both Federally threatened species under the Endangered Species Act (ESA). NMFS believes that flow related actions to this violation are more important than those of this petition. Flow related decisions related to NRDC v. Patterson should be determined before approval of this petition to ensure that there is sufficient water to remediate this violation.

Third, Spring-run Chinook salmon once occurred in abundance in the San Joaquin River prior to the construction and operation of dams. Therefore, the San Joaquin River is considered as Essential Fish Habitat (EFH) for Spring-run Chinook salmon and subject to the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) (October 11, 1993). MSFCMA directs each Federal agency to consult with NMFS with respect to any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken by such agency that may adversely affect any EFH identified in MSFCMA. BOR should consult with NMFS to determine measures which will avoid adverse impacts to Spring-run Chinook salmon EFH in the San Joaquin River.

Fourth, lack of flow in the San Joaquin River downstream of Friant Dam has had significant adverse impacts to the Sacramento-San Joaquin Estuary, including: 1) concentrating toxics in agricultural return flow that now exceed Total Maximum Daily Load (TMDL) criteria for many water quality standards; 2) decreasing resistance to salt intrusion from the Greater San Francisco Bay during tidal fluctuations; and 3) entraining as much as 25% to 40% of the annual smolt production of Winter-run Chinook salmon (ESA endangered), Spring-run Chinook salmon (ESA threatened), and steelhead (ESA threatened) through the Delta-Cross Channel into the Central Delta (NMFS 1993). The Central Delta has numerous unscreened diversions, many areas of flow reversal that remove migratory clues so any smolt entrained is not expected to live. The proposed change of place only exacerbates the adverse impacts downstream of Friant Dam.

Fifth, delivery of water to Sky Harbour, Hidden Lakes Estates, Brighton Crest and Millerton New Town, and Table Mountain, and the lack of delivery of adequate water to the San Joaquin River downstream of Friant Dam were violations of State law. Both have effects on water supply and impacts to fish populations. NMFS thinks it prudent to

solve each of these problems sequentially and in order of importance. Water delivery to these communities can be made in conjunction with the NRDC v. Patterson issue, but not the other way around. Solve the NRDC v. Patterson issue first.

Proposed Change

The applicant has been delivering unauthorized water to Sky Harbour, Hidden Lakes Estates, Brighton Crest and Millerton New Town, and Table Mountain. Through this application, BOR is now seeking to legitimize these deliveries. These proposed changes cannot be supported by NMFS unless and until sufficient water of good quality is released to the lower San Joaquin River in order to maintain fish in good condition.

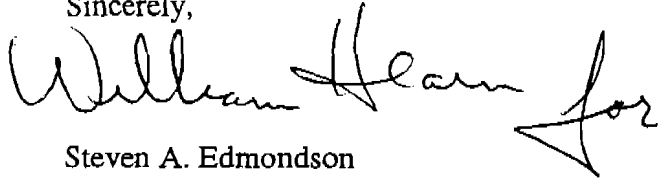
Recommendations

In order to address NMFS' concerns, we recommend the following measures be taken:

1. SWRCB should hold this petition in abeyance until water allocation issues are resolved consistent with NRDC v. Patterson.
2. BOR should consult with NMFS so that flows can be identified which will keep fish in good condition; thus minimizing adverse effects to Spring-run Chinook salmon EFH, as well as other salmonids in the San Joaquin River.
3. In addition, we encourage SWRCB to consider the concept of correlative use and its relationship to water rights. Correlative Use is using water for as many functions possible before it is consumed. In this case, correlative use involves releasing substantial flows downstream in the San Joaquin River to the Delta, where multiple benefits would be derived for people, as well as fish and wildlife. As the water flows into the Delta, the CVP/SWP pumps can export water south to the required delivery sites through existing canals and aqueducts. This operating scenario would require certain conveyance, irrigation, and fish screening system modifications, but in this way the principle of maximum correlative use of San Joaquin River water might be realized - for the benefit of both people and living natural resources.
4. We believe correlative use is a key concept to returning flows to the San Joaquin River to keep fish in good condition while still enabling irrigation and diversion activities. It can solve much of the TMDL problems in the Central Valley and may be the key to restoring listed salmonids in California. It has significant benefits for all of California and asks SWRCB to evaluate how correlative use affects water rights, particularly within the context of this petition.

Thank you for your cooperation in the above. We look forward to continued opportunities for NMFS and the SWRCB to cooperate in the conservation of listed species. If you have any questions or comments concerning the contents of this letter, please contact Dr. Stacy Li at (707) 575-6090.

Sincerely,

A handwritten signature in cursive script that reads "William Hearn" followed by a stylized flourish.

Steven A. Edmondson
Northern California Habitat Supervisor

cc: Jo Ann Struebing, U.S. BOR
Michael Aceituno, NMFS
Dr. William Hearn, NMFS
Richard Wantuck, NMFS
Bill Loudermilk, CDFG

References

National Marine Fisheries Service (NMFS). 1993. Biological Opinion for the Operation of the Federal Central Valley Project and the California State Water Project.

Natural Resources Defense Council vs. Patterson. 2004. U.S. District Court, Eastern District California No.Civ: S-881658 LKK.